Supreme Court, U.S.
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No. 98-2023

IN THE

Supreme Court of the United States

ALABAMA MUNICIPAL INSURANCE CORPORATION, *et al.*,

Petitioners,

v.

STATE OF ALABAMA; JAMES P. HAYES, JR., Commissioner of the Alabama Department of Revenue; and DAVID PARSONS, Acting Commissioner of the Alabama Department of Insurance,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Alabama erred when it applied settled rational basis doctrine under the Equal Protection Clause to reject a fact-bound challenge to Alabama's insurance premium tax statute?

2. Whether the Supreme Court of Alabama applied a "beyond a reasonable doubt" standard to a challenge under the United States Constitution to Alabama's insurance premium tax statute, and whether, if it did, the court erred in doing so?

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Respondents, the State of Alabama, the Commissioner of the Alabama Department of Revenue, and the Commissioner of the Alabama Department of Insurance (collectively, the "State"), respectfully request this Court to deny the petition for a writ of certiorari. The petition seeks review of the Supreme Court of Alabama's decision upholding the constitutionality of Alabama's insurance premium tax law. The Supreme Court of Alabama's opinion is reported at 730 So. 2d 107 (Ala. 1998), and is reproduced as Appendix A to the petition. The decision of the Circuit Court of Montgomery County, Alabama is unreported, but is attached to the petition as Appendix B. The Insurance Premium Tax Reform Act of 1993 is included as Appendix C to the petition.

STATEMENT OF THE CASE

Petitioners' statement of the case fails to include a number of salient facts necessary to a full understanding of this case. The State incorporates by reference the facts and procedural history in the Supreme Court of Alabama's opinion, *see* Pet. App. at 2a–6a, in addition to making the following observations.

As an initial matter, the petition glosses over the history of Alabama's insurance premium tax law. In 1985, this Court determined that, under the Equal Protection Clause, Alabama could not justify its imposition of higher tax rates on out-of-state insurance companies than in-state companies on the basis of residence alone. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878–79 (1985). On remand, the out-of-state plaintiffs in *Metropolitan Life* agreed to dismiss their litigation in exchange for passage of new premium tax legislation to equalize the rates charged to in-state and out-of-state insurance companies. *See* R. 132–33; Pls. Ex. 45.

After many failed attempts to implement tax reform consistent with this Court's decision in *Metropolitan Life*, the Alabama Legislature enacted the Insurance Premium Tax Reform Act of 1993 (the "Act") to overhaul Alabama's insurance premium taxation system. *See* Pet. App. at 2a–3a; Pls. Ex. 3, R. 311–12. The Governor signed the Act on May 17, 1993. *See* Pls. Ex. 3, at p. 17. By its terms, the Act went into effect on January 1, 1995. *See id.* § 14. Petitioners filed suit to challenge the Act's constitutionality on March 9, 1995. R.1.

Three years later, the Supreme Court of Alabama unanimously upheld the constitutionality of the Act under both the Alabama and United States Constitutions. *See* Pet. App. at 1a. The court first examined the Act's constitutionality under the Alabama Constitution. Recognizing the deference owed to acts of the Legislature, the court invoked Alabama's constitutional rule that a state statute will not be invalidated "unless it is clear beyond reasonable doubt that [the act violates] the fundamental law." Pet. App. at 6a (*quoting Alabama State Fed'n of Labor v. McAdory*, 18 So. 2d 810, 815 (Ala. 1944)). The court then noted that taxation statutes receive the greatest amount of judicial deference:

> Legislative classifications in tax matters are presumably valid, the burden being on the challenger to prove that such a classification or subclassification does not rest on a reasonable basis and such statutes are not to be deemed unconstitutional or invalid if any state of facts can be conceived which would support the subject of the tax.

Pet. App. at 7a (quoting *Haden v. Watson*, 117 So. 2d 694, 696 (Ala. 1960)).

Applying these long-standing principles, the Alabama court concluded that petitioners had failed to meet "their heavy burden" of challenging tax legislation under the Alabama Constitution. Pet. App. at 10a. The court agreed with the State that the Act does not discriminate between classes of insurers, observing that the Act "imposes a flat premium tax rate on all insurers, foreign and domestic, without exception" and employs tax credits "based on objective, clearly ascertainable criteria." Pet. App. at 9a. The court rejected petitioners' economic argument outright. Recognizing that some of petitioners "are economically unable at this time to qualify for the credits," the court pointed out "that their inability to qualify is a result of their own business decisions and their own economic performance." *Id.* The court also understood how the changeable nature of the market could alter petitioners' conditions. Notwithstanding the fact that some of petitioners could not invest the maximum amount in Alabama real estate because "their total assets [were] too low" during the tax year at issue, the court realized "those companies could grow and thus be able to invest more" in future years. *Id.* Accordingly, the court held the Act did not violate the Alabama Constitution. Pet. App. at 10a.

The Supreme Court of Alabama then proceeded to decide the federal constitutional challenge. Citing *Western & Southern Life Insurance Company v. State Board of Equalization of California*, 451 U.S. 648, 657 (1981), the court asked, "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose?" Pet. App. at 10a. By the court's reasoning, the answer to both questions was yes. The court credited the State's argument that the Office

Credit would "encourage competition among insurers in rural areas of the state" by creating incentives for insurers "to open more offices in the state, . . . presumably in areas not already dominated by their competitors," thereby providing greater access to insurance for citizens of rural areas." Pet. App. at 11a. The court also accepted the State's argument that the Office Credit "is designed to encourage the employment of Alabama citizens" and that the Property Credit "is designed to encourage all insurance companies, foreign and domestic, to invest in Alabama property." *Id.*

Applying this Court's settled "rational basis" doctrine to these facts, the Supreme Court of Alabama concluded it was "at least debatable" whether "the challenged tax credits are rationally related to [the State's] goals." Pet. App. at 11a (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)). The Alabama court decided "[i]t was reasonable for the members of the legislature to believe" the Act's tax credits would "encourag[e] investment in the state and encourag[e] insurers to employ Alabama citizens and to open offices in rural areas." Pet. App. at 11a. Consequently, the court held "the challenged credits do not violate the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution." *Id.* at 11a–12a.

In addition to overlooking the Act's history and short-changing the Supreme Court of Alabama's analysis, petitioners' discussion also gives the erroneous impression that the Act offered little, if any, benefit to them. In fact, the record demonstrates that petitioners reaped meaningful benefits from the operation of the Act. The Act imposes a base tax rate of 3.6% on all property and casualty insurance premiums collected in any given tax year. Ala. Code § 27-41-3(a)(3). The Act provides tax relief from the base

rate in the form of reduced rates and tax credits to every property and casualty insurance company doing business in Alabama. *See id.* §§ 27-4A-3(a)(3)b, -3(a)(3)c, & -3(a)(3)d.

Every petitioner with taxable premiums in 1995 took advantage of these provisions in one way or another, something the petition conspicuously elides. For instance, the Act taxes all "property insurance and multi-peril insurance" written in high-risk, rural areas at only 1% per annum. *Id.* § 27-4A-3(a)(3)b.1. The same is true for homeowners' policies covering "mobile homes" and "low value dwelling policies in a face amount of $40,000 or less," which are also taxed at 1%. *Id.* § 27-4A-3(a)(3)b.2. Petitioners fail to mention the significant tax benefit they received under these provisions. The evidence at trial showed Petitioner Baldwin Mutual Insurance Company paid only 1% in tax on $7.1 million of its $8.3 million in premiums because the bulk of its business fell within the statutory exemption for high-risk fire protection and low-value homeowners' policies. *See* R. 124–25, 306–08; Pls. Ex. 65. As a result, Baldwin Mutual's effective premium tax rate on its Alabama property and casualty business in 1995 was lower than that of Alfa Mutual Insurance Company, the insurer portrayed by petitioners as the Act's largest beneficiary. *Compare* Pls. Ex. 65 *with* Pls. Ex. 48. *See* R. 125, 306. Petitioners Alabama Municipal Insurance Company and Southern Guaranty Insurance Company also took advantage of this 1% tax rate. *See* R. 300; Pls. Exs. 62, 69.

The Act also provides tax credits that reward the provision of insurance throughout the State, employment of Alabama workers, and investment in Alabama real estate. For example, the Office Credit provides a credit against the 3.6% base rate for "each office owned or leased by an insurer

in the State of Alabama and used for insurance operations" in increments according to the number of employees in the office. Ala. Code § 27-4A-3(a)(3)d.1. The Property Credit entitles an insurer to a 0.10% credit against the 3.6% base rate for "each $1,000,000 in value of real property investments in the State of Alabama." *Id.* § 27-4A-3(a)(3)d.2. Again, petitioners fail to mention the benefits they received from these provisions. In fact, the record shows five of the seven petitioners received tax credits in 1995 under the Office Credit, the Property Credit, or both. *See* Pls. Exs. 57–59. Presumably, the other two petitioners did not receive credits due to conscious business choices. Alabama Municipal's president testified that the company could not use the Office Credit because it has no offices or employees in Alabama, and it chose not to take advantage of the Property Credit because real estate is not a "proper investment for our firm." R. 300–01.

REASONS FOR DENYING THE WRIT

I. THIS CASE INVOLVES THE FACT-BOUND APPLICATION OF SETTLED RATIONAL BASIS DOCTRINE UNDER THE EQUAL PROTECTION CLAUSE, AND THERE IS NO CONFLICT OF AUTHORITY AMONG THE LOWER FEDERAL COURTS OR THE STATE COURTS CONCERNING THIS STANDARD.

This case is a run-of-the-mill state tax challenge that does not present a novel question of federal constitutional law. Notwithstanding petitioners' multi-faceted attempt to manufacture a cert-worthy question, this case involves nothing more than the Supreme Court of Alabama's application of settled rational basis principles under the Equal

Protection Clause to the particularized facts of this case. The Supreme Court of Alabama upheld the Act because it "employ[s] reasonable classifications designed to reach . . . legitimate legislatively determined goals." Pet. App. at 11a. Arising in an area in which this Court has given lower courts clear guidance, this case does not involve an "important federal question" on which the Supreme Court of Alabama has rendered a decision in conflict with a decision of another state court of last resort or one of the United States courts of appeals. Sup. Ct. R. 10(b). The Alabama court in this case did not decide an unsettled question of federal law, nor did its ruling in this case conflict with other relevant decisions of this Court. *See* Sup. Ct. R. 10(c). This Court should therefore decline to expend its limited resources by granting certiorari review in this case.

A. The Supreme Court of Alabama closely adhered to this Court's precedents in making the fact-bound determination that the statute at issue does not violate the Equal Protection Clause.

In determining the constitutionality of the Act, the Supreme Court of Alabama followed this Court's well-developed rational basis analysis under the Equal Protection Clause. Review of the Alabama court's decision would entail nothing more than a determination of whether this Court's settled precedents were correctly applied to the facts of this case. Notwithstanding petitioners' remarkable claim that this area of the law requires further "clarity and coherence," Pet. at 9, the core constitutional doctrine at issue has been settled for sixty years: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis

within the knowledge and experience of the legislators." *Carolene Products*, 304 U.S. at 152. *Accord Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461–63 (1981). If a legislative classification has a "reasonable basis," it does not "offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

When it undertook its analysis of the Act under the Equal Protection Clause, the Supreme Court of Alabama faced a body of law clearly defining the high degree of deference owed to legislative enactments under rational basis scrutiny. In *Federal Communications Commission v. Beach Communications, Inc.*, this Court described the governing standard as "a paradigm of judicial restraint." 508 U.S. 307, 314 (1993). Without dissent, the Court declared, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *Id.* at 313 (emphasis added). In other words, a "legislative choice is not subject to courtroom fact-finding and may be based on *rational speculation unsupported by evidence or empirical data*." *Id.* at 315 (emphasis added). The necessity of legislative line-drawing thus "renders the precise coordinates of the resulting legislative judgment *virtually unreviewable*, since the legislature must be allowed to approach a problem incrementally." *Id.* at 316 (emphasis added).

Furthermore, when tax laws are at issue, the standard of review is even more deferential. As this Court has made plain,

the Fourteenth Amendment to the United States Constitution "was not intended to compel the states to adopt an iron rule of equal taxation." *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). "To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959). As a result, federal constitutional review of state taxation statutes provides legislatures "the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). This is especially true when considering narrow exemptions from a general scheme of taxation such as those at issue here, where the "latitude of discretion is notably wide." *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992). *Accord F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550–51 (1983). Consequently, this case involves arguably the most deferential standard of review in all of constitutional law.

The Supreme Court of Alabama followed this Court's rational basis precedents to the letter. First, the Alabama court determined that the Act employs reasonable classifications to accomplish the State's legitimate goals of encouraging investment in Alabama, increasing employment of Alabama citizens, and providing insurance to Alabama's most underserved areas. *See* Pet. App. at 11a. The court then decided that the question whether the challenged tax credits are rationally related to those goals is "at least debatable." *Id.* (*quoting Carolene Products*, 304 U.S. at 154). Furthermore, the Alabama court found it was reasonable for the Alabama Legislature to believe that the Act would further those goals. *Id.* Based upon those findings, the Supreme

Court of Alabama ultimately (and unanimously) concluded the Act does not violate the Equal Protection Clause of the United States Constitution. *See id.* at 11a–12a.[1]

Although cloaked in a contention that the Supreme Court of Alabama's analysis was not searching enough,[2] the essential thrust of petitioners' argument is that the judiciary should be empowered to re-tailor the legislative classifications to better support the interests asserted by the State. This Court has repeatedly rejected such a view of the judiciary's authority under rational basis scrutiny. In *City of New Orleans v. Dukes*, this Court refused to invalidate a New Orleans city ordinance that favored established businesses over new ones, stating that the Equal Protection Clause does not empower the judiciary to "sit as a superlegislature to

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1. Notably, petitioners do not (and indeed cannot) challenge the legitimacy of the legislative purposes articulated by the State. Therefore, this case arises solely under the second prong of the rational basis test, *i.e.*, it turns upon whether the Alabama Legislature could have reasonably determined that the challenged credits would promote these purposes.

2. Petitioners' contention that the Supreme Court of Alabama did not undertake a sufficiently detailed analysis of the efficacy of the Act in furthering the proffered State interests cannot withstand scrutiny. It hardly requires a lengthy discussion to conclude that a credit for opening offices with certain numbers of employees promotes the State's interest in creating jobs and encouraging the opening of offices in rural areas. Petitioners' argument as to the insufficiency of the Alabama court's analysis in this regard is premised on their faulty view of how the Act operates. *See infra* at 12–14. In addition, petitioners' claim that the State failed to address the alleged inability of certain insurers to take full advantage of the credits overlooks the Alabama court's discussion of that very point. *See* Pet. App. at 9a.

judge the wisdom or desirability of legislative policy determinations . . . in the local economic sphere." 427 U.S. 297, 303 (1976). More recently, in *Nordlinger v. Hahn*, this Court refused to strike as unconstitutional exemptions to a state's general taxation law, reiterating how "[i]n structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " 505 U.S. at 11 (1992) (*quoting Williams v. Vermont*, 472 U.S. 14, 22 (1985), and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). *Accord Taxation with Representation*, 461 U.S. at 547–48. This Court has indicated that the more appropriate place to correct what petitioners view as an unfair tax benefit to their competitors is at the polls, not in the courts. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 n.12 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488–89 (1955).

A grant of certiorari in this case would be a waste of this Court's limited resources. Rational basis doctrine under the Equal Protection Clause in cases involving state tax laws has been well defined by this Court. There is no need for additional guidance. The Supreme Court of Alabama correctly applied this Court's settled precedents to the facts of this case in reaching the decision below. No additional review is necessary.

B. Petitioners have concocted nonexistent conflicts with this Court's jurisprudence, Alabama public policy, and decisions of lower courts in a futile attempt to make this case appear to be worthy of certiorari review.

Through a strained and ultimately indefensible reading of several of this Court's precedents, petitioners cite three

ostensible categories of Equal Protection violations inherent in the Act, none of which merits certiorari review by this Court. In fact, petitioners' alleged conflicts with this Court's jurisprudence and the decisions of other courts melt away under the most casual scrutiny.

1. *The Act's incentives for future economic activities are based on alterable economic conditions, not matters frozen in the past.*

Petitioners' claim that the Supreme Court of Alabama's decision ran afoul of *Zobel v. Williams*, 457 U.S. 55 (1982) — because, the argument goes, the State's interest in encouraging future activity is tied to past conduct, *see* Pet. at 11–15 — is factually, economically, and legally inaccurate. As a factual matter, the credits available under the Act are not tied to past conduct. The Act was signed into law on May 17, 1993, Pet. at 4, but it did not take effect until the tax year beginning January 1, 1995. Ala. Code § 27-4A-3. Consequently, all insurers in Alabama had more than eighteen months to make the business decisions necessary to qualify for the Act's tax credits. Furthermore, the Act imposes premium taxes each year, taking into account each insurer's ability to qualify for the Office Credit and the Property Credit based on its circumstances and holdings for that tax year. *Id.* § 27-4A-3(a). Petitioners' contention that the Act "contains no requirement that there be economic activity as a condition to achieving either credit," Pet. at 11, therefore, cannot be reconciled with the practical operation of the credits. As the State proved at trial, maintaining offices throughout Alabama, employing Alabama citizens, and retaining or purchasing property in Alabama during any given tax year qualify as present economic activity encouraged by the credits. *See* R. 494–502.

Economically speaking, petitioners' argument that the tax credits reward past economic activity merely states the obvious. Tax credits, like taxation in general, are inherently based upon past activity because they are applied at the end of a given tax year. The more pertinent question is whether the tax credits provided by the Act create an incentive for future investment, employment, and provision of insurance to rural areas. To argue, as petitioners do, that the Act contains no incentive for future economic activity belies the realities of the market. Insurers, like every other company, make business decisions based on present conditions and future potential, not on past costs already sunk. *See* Robert B. Ekelund, Jr. and Robert D. Tollison, *Economics* 182 (2d ed. 1988). The Act, by incrementally rewarding insurers for the offices they maintain, workers they employ, and property they own throughout Alabama, encourages insurers to conduct economic activity in each taxation period. *See* R. 507. This is so even for a company that enjoyed the maximum credit allowable under the Act in a previous year; such a company must, under the Act, keep its offices open, continue employing its workers, and retain its property to enjoy the same tax benefit in the following year. By the same token, smaller companies who do not currently enjoy the maximum credits available under the Act have an incentive, in the words of the Supreme Court of Alabama, to "grow and thus be able to invest more." Pet. App. at 9a. Just because some of petitioners' competitors currently enjoy a greater fraction of the available tax credits does not mean the Act is irrational. "The task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment

be placed on different sides of the line, and the fact that the line may have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Fritz*, 449 U.S. at 179 (internal quotations and citation omitted).

Most important, as a matter of law this Court's holding in *Zobel* has no application to this case. Offices a company can close, employees it can fire, and property it can sell are not inalterable aspects of the past. What *Zobel* prohibits is purportedly encouraging future activity with statutes that reward conduct frozen in the past. *See Zobel*, 457 U.S. at 62. At issue in *Zobel* was an Alaska statute that allocated payments from a state fund to residents based upon the number of years of residency in the state since 1959. Although the statute was allegedly enacted to encourage persons to establish residency in Alaska, it rewarded persons based solely on "fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State." *Id.* at 59. There was no provision in the statute that capped the extra benefit that a resident received who had lived in Alaska for a longer period of time vis-à-vis a resident who had lived in Alaska for a shorter period of time, so there was no means by which the latter resident could equalize the payment he received from the state fund. Unlike the situation in *Zobel*, the Act requires that a new assessment of entitlement to the credits be made each year, so any insurer that undertakes sufficient economic activity can attain the maximum benefit allowed by the Act.[3]

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3. Even if *Zobel* were otherwise relevant, the continuing applicability of the case as an Equal Protection Clause precedent has (Cont'd)

The decisions of the Vermont Supreme Court and the Alaska Supreme Court cited by petitioners are equally inapposite. In each of those cases, as in *Zobel*, similarly situated individuals were accorded different benefits based on the inalterable criterion of past residency. *See Bagley v. Vermont Dept. of Taxes*, 500 A.2d 223, 224–26 (Vt. 1985); *Gilman v. Martin*, 662 P.2d 120, 125–27 (Alaska 1983). Under the Alabama Act, by contrast, similarly situated insurers in a given year are afforded the same credits, irrespective of place or duration of residency. Thus, there is no basis for petitioners to contend that there is a conflict of authority among these state courts which would support exercise of this Court's certiorari jurisdiction.

2. *The existence of separate Alabama statutes that seek to advance complementary goals does not give rise to a constitutional violation.*

In a further effort to justify their argument for certiorari review, petitioners make the astounding suggestion that a

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(Cont'd)
been called into serious question by the Court's recent decision in *Saenz v. Roe*, __ U.S. __, 119 S. Ct. 1518 (1999). The ruling in *Zobel* seemed to be grounded in the aspect of the right to travel related to the right of new residents of a State to be free from being disadvantaged by their status as new residents. *See Zobel*, 457 U.S. at 60 n.6; *id.* at 66 (Brennan, J., concurring); *id.* at 71 (O'Connor, J., concurring in judgment). In *Saenz*, this Court determined that the right to travel is not an Equal Protection Clause concern, but rather is founded on the Privileges and Immunities Clause. *Saenz*, 119 S. Ct. at 1526–27. Furthermore, to the extent that *Zobel* is based on the right to travel, it has no relevance to this case because there has been no allegation that the Act makes any distinction between in-state and out-of-state insurers or between insurers with an established presence in Alabama and those who have recently entered the State's insurance market.

state commits a constitutional violation whenever it enacts a statute that embodies a policy inconsistent with that contained in a separate, independent statute. *See* Pet. at 15–22. Not only is this suggestion wholly unsupported by this Court's precedents, but petitioners' argument is also premised on a faulty analysis of the interaction between the Act and another Alabama statute.

The case on which petitioners rely to support their novel argument in this regard is *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989); but *Allegheny Pittsburgh* does not even remotely support the sweeping proposition of constitutional law that petitioners ascribe to it. In that case, the Court held a county tax assessor committed an Equal Protection Clause violation when she assessed property taxes in direct violation of a state constitutional provision requiring tax assessment proportional to the value of the property. Far from endorsing *Allegheny Pittsburgh* as a broad prohibition against potentially inconsistent statutes, this Court has subsequently explained that *Allegheny Pittsburgh* was "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of a [proportional] tax scheme." *Nordlinger*, 505 U.S. at 15. Indeed, the Court has reaffirmed that, "[f]or purposes of rational-basis review, 'the latitude of discretion is notably wide in . . . the granting of partial or total exemptions [from a general scheme of taxation] upon grounds of policy.' " *Id.* at 17 (*quoting F.S. Royster Guano Co.*, 253 U.S. at 415).

In this case, petitioners do not contend that the State of Alabama applied the credits allowed under the Act in a manner inconsistent with the terms of the Act. Instead,

petitioners claim that the incentive to invest in Alabama real property created by the Property Credit is inconsistent with the 10% property-to-asset limit for insurers set by Alabama Code § 27-41-34(b)(2). *See* Pet. at 15–22. What petitioners portray as an inconsistency is, in reality, sound legislative policy accomplished by two complementary statutes. On one hand, the Property Credit encourages insurers to buy Alabama real estate to foster investment in Alabama, a point petitioners' own experts conceded at trial. *See* R. 110, 279. On the other hand, as one of petitioners' experts testified, the 10% property-to-asset limit assures the solvency of insurers within the guidelines established by the National Association of Insurance Commissioners. *See* R. 42.

It is entirely reasonable for the State of Alabama to foster investment in real estate via the Property Credit while at the same time protecting against insolvency by limiting the percentage of assets an insurer may invest. For, as this Court has repeatedly recognized, "[t]he problem of legislative classification is a perennial one, admitting of no doctrinaire definition"; legislatures are therefore free to treat "[e]vils in the same field" with "different remedies," so long as those remedies are not invidious. *Beach Communications*, 508 U.S. at 316 (quoting *Williamson*, 348 U.S. at 489). The State's complementary goals of encouraging investment and ensuring solvency are equally legitimate. Neither *Allegheny Pittsburgh* nor the Equal Protection Clause prevents the State from pursuing these goals simultaneously through different means.

For this Court to intrude upon state legislative determinations in the manner proposed by petitioners would mark a sea change in rational basis Equal Protection Clause jurisprudence, and would impose a nearly impossible burden

on courts reviewing state statutes. Courts would have to canvass the entire universe of a state's statutes to ascertain whether any of them reflects a policy inconsistent with the statute in question. Such an approach would ignore the realities of the legislative process in which competing and sometimes conflicting objectives are often at play in different pieces of legislation.[4] Petitioners' approach would also conflict with this Court's admonition that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Dukes*, 427 U.S. at 303. The Alabama Legislature passed the Act to eliminate the residency-based discrimination struck down by this Court in *Metropolitan Life* and enacted the tax credits to encourage investment, employment, and the provision of insurance in rural areas. The Supreme Court of Alabama, while recognizing that certain insurers were presently unable to reap the full benefits of the Act, did not deem the State's policies irreconcilable. *See* Pet. App. at 9a. Because this Court does not sit as a superlegislature, it simply has no basis to upset the policy determinations made by the Alabama Legislature and reviewed by the Supreme Court of Alabama.

Petitioners' suggestion that the decision below conflicts with a decision of the South Dakota Supreme Court is baseless. There is no difference in the South Dakota court's reasoning in *State v. American Bankers Insurance Company*, 374 N.W.2d 609 (S.D. 1985), and that employed by the

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4. One obvious example is the federal government's treatment of tobacco. While one federal law provides price supports to tobacco farmers, *see* 7 U.S.C. § 1445, another provides federal funding for anti-tobacco campaigns, *see* 15 U.S.C. § 1341.

Supreme Court of Alabama in this case. In fact, the South Dakota court cites the same precedent of this Court — *Western & Southern Life Insurance Company v. State Board of Equalization* — that the Alabama court cited as the touchstone for its constitutional analysis. *Compare American Bankers*, 374 N.W.2d at 615, *with* Pet. App. at 10a. Moreover, the insurance premium statute at issue in *American Bankers* taxed unlicensed out-of-state companies at a rate one and a half times the rate payable by domestic insurers or licensed foreign insurers. *See* 374 N.W.2d at 615. Relying on this Court's holding in *Metropolitan Life*, the South Dakota court held the statute unconstitutional on the ground that "the imposition of a discriminatory tax on foreign corporations on the pretext of promoting domestic industry within the state is prohibited by the equal protection clause." *Id.* at 616–17. Petitioners cannot argue that this proposition has any bearing upon this Act, which the Alabama Legislature passed to remove any distinctions based upon residency in direct response to this Court's decision in *Metropolitan Life*.

Even if this Court were inclined to consider the question whether two state statutes embodying potentially inconsistent policies can give rise to an Equal Protection violation under rational basis scrutiny, this case is a poor vehicle for such consideration because the Act does not operate in the stark terms portrayed by petitioners. The petition contends, "Alabama law actually *precludes* most of the State's insurance companies from taking full (and in many cases, *any*) advantage of the credit," Pet. at 16, going so far at one point to allege "that many insurance companies are forbidden by Alabama law from making the type of investment that would enable them to qualify for the [Property Credit]," *id.* at 19. What petitioners do not say, however, is that their

inability to take full advantage of the tax credits is attributable more to their individual economic circumstances than to Alabama law. In any event, petitioners have oversimplified the requirements of Alabama's Insurance Code.

Alabama's statutory limits on real estate investment are much more nuanced than the petition might suggest. The 10% property-to-asset limit does not apply "where the total amount invested by an insurer in such investments does not exceed the total capital and surplus of such insurer, less the minimum capital and surplus required [for admitted assets]." Ala. Code § 27-41-34(g). In other words, any insurer "may make an investment without limitation as to kind" — for example, more than 10% of its assets in real property — provided its "admitted assets" shown on its financial statements are "eligible investments," as defined by §§ 27-41-7 to 27-41-35. *Id.* § 27-41-41. Petitioners' expert recognized this at trial, testifying that 10% of an insurer's assets is "the maximum that they could invest *and still have it be an admitted asset*." R. 43 (emphasis added). Rather than create an absolute bar preventing an insurer from owning real estate whose value exceeds 10% of the insurer's assets, the Alabama Insurance Code allows an insurer to purchase an unlimited amount of real estate to qualify for the Property Credit, provided the insurer does not need the additional real estate as an asset for purposes of demonstrating its financial soundness to the insurance commissioner. Even if *Allegheny Pittsburgh* precluded a state from furthering competing policies with different statutes (which it does not), this case does not squarely present that situation.

3. *The Act does not employ classifications for their own sake.*

Petitioners' argument, based on *Romer v. Evans*, 517 U.S. 620 (1996), and a number of separate or dissenting opinions in other cases, that the Act employs classifications for their own sake is easily dismissed. As a threshold matter, this case bears no relation to *Romer*, where the citizens of Colorado passed a statewide referendum excluding gays, lesbians, and bisexuals from state protection. Although petitioners obviously feel the Act is unfair (going so far as to compare its tax credits to "gerrymandering," *see* Pet. at 23), the Act is a far cry from laws that "singl[e] out a certain class of citizens for disfavored status" or "deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 633, 635.

Furthermore, petitioners' theory that one company convinced the Alabama Legislature to grant it favored status requires a highly speculative view of the record. For every record citation that petitioners claim confirms their theory, the State can point to more rational explanations for the tax credits, such as encouraging insurance companies to invest in real property, fostering competition in the industry, and creating incentives for insurers to open offices, employ workers, and provide insurance in rural areas. *See* R. 323–26, 407–09, 461–70, 472–75, 479; Pls. Ex. 2.

More fundamentally, the effort by petitioners to attack the Act on Equal Protection Clause grounds by presenting evidence at trial of the alleged political maneuvering behind the Act's passage is wholly inconsistent with this Court's precedents. Under rational basis Equal Protection Clause scrutiny, "this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *Fritz*, 449 U.S.

at 179. Indeed, "the absence of legislative facts explaining [the statute] on the record has no significance in rational-basis analysis," meaning "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315 (citations and internal quotations omitted). Furthermore, this Court has made clear that "legislative choice is not subject to courtroom fact-finding." *Id.* Petitioners essentially ask this Court to reverse course by adopting a jurisprudence where courts would conduct trials to determine which interest group was responsible for passage of legislation. Not only does such an approach ignore the impossibility of determining what influenced various legislators in voting for passage of a bill, but that approach would also lead to grave intrusions on core separation-of-powers and federalism concerns.

Where, as here, this Court has faced complaints raised by parties who "lost a political battle in which [they] had a strong interest," the Court has wisely chosen to defer to the political process. *See Fritz*, 449 U.S. at 179. As this Court stated over a half century ago, "the passage of time has only served to underscore the wisdom of . . . recogni[zing] the . . . large area of discretion which is needed by a legislature in formulating sound tax policies." *Madden*, 309 U.S. at 88. Petitioners hope to overthrow such wisdom by going behind the intentions of the Legislature to question the influence of certain interest groups. This argument, like all the others in the petition, does not withstand scrutiny.

II. PETITIONERS' CONTENTION CONCERNING THE SUPREME COURT OF ALABAMA'S USE OF A "BEYOND A REASONABLE DOUBT" STANDARD WAS NOT RAISED BELOW AND RELIES ON A MISCHARACTERIZATION OF THE ALABAMA COURT'S OPINION.

The second question presented by the petition does not warrant certiorari review because petitioners failed to raise it below. In all of their briefs below, including their brief in support of rehearing before the Supreme Court of Alabama, the petitioners never argued that the long-standing "beyond a reasonable doubt" standard governing tax challenges under the Alabama Constitution conflicts with federal law. Rather, petitioners first articulated this argument in their petition to this Court for certiorari review. *See* Pet. at 9, 24–26. Ordinarily, "this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Therefore, this question is not properly before the Court. *See Delta Air Lines v. August*, 450 U.S. 346, 362 (1981).

Even if the failure to raise the question below did not bar certiorari review by this Court, petitioners' second question rests on a gross mischaracterization of the Supreme Court of Alabama's opinion. Focusing on one sentence from an introductory portion of the opinion, petitioners (through the strategic use of ellipses) claim the Supreme Court of Alabama required them to prove "*beyond a reasonable doubt* that the tax credits at issue violate * * * the Federal Constitution." *See* Pet. at 7, 24.[5] A full and fair reading of

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5. In full, the Alabama court wrote, "we conclude that it is not beyond a reasonable doubt that the tax credits at issue violate either the Alabama Constitution or the Federal Constitution." Pet. App. at 8a–9a.

the Alabama court's opinion, however, exposes the fallacy in petitioners' characterization of this issue. Following the quoted introduction, the court consciously applied its long-standing "beyond a reasonable doubt" standard governing tax challenges under the Alabama Constitution before it proceeded to the federal constitutional question. *See* Pet. App. at 9a–10a. The Supreme Court of Alabama took great pains to analyze the state and federal claims independently; it did not invoke the "beyond a reasonable doubt" standard in its analysis of the federal claim. Instead, the Alabama court used the approach outlined in this Court's precedents in reaching the conclusion that the Act contained no Equal Protection Clause violation. *See* Pet. App. at 10a–12a.

In a last-ditch effort to create a split of authority, petitioners pit a number of state supreme court decisions that purportedly hold "federal rational basis claims must be proved beyond a reasonable doubt" against federal courts of appeals that allegedly reject such a standard. *See* Pet. at 24–25. This alleged split of authority does not present a question warranting certiorari review in this case because the Alabama court did not apply the standard in question to the federal constitutional issue below. Even if that were not a bar to review, however, the alleged conflict of decisions is illusory. The state cases petitioners cite use the phrase "beyond a reasonable doubt" as a shorthand for a challenger's heavy burden of proving an Equal Protection Clause violation. *See Westling v. County of Mille Lacs*, 581 N.W.2d 815, 819 (Minn. 1998), *cert. denied*, 119 S. Ct. 872 (1999); *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 506 (Colo. 1997); *Wisconsin v. Akins*, 544 N.W.2d 392, 395 (Wis. 1996); *Richardson v. Sport Shinko*, 880 P.2d 169, 191 (Haw. 1994); *Bruns v. Iowa*, 503 N.W.2d 607, 610 (Iowa 1993); *Blaske v.*

Smith & Entzeroth, Inc., 821 S.W.2d 822, 828–29 (Mo. 1991) (en banc); *Ford Motor Co. v. Barrett*, 800 P.2d 367, 374 (Wash. 1990) (en banc); *Harbor Insurance Co. v. Groppo*, 544 A.2d 1221, 1224 (Conn. 1988); *Birchfield v. Birchfield*, 417 N.W.2d 891, 894 (S.D. 1988). The only distinction between these state cases and the federal decisions cited by petitioners is the use of the phrase "beyond a reasonable doubt." That is a distinction without a substantive difference. This Court should not grant certiorari review to consider such a question of semantics.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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